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Nos. 83-1226 and 83-1227

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN GARRETT, PETITIONER

v.

UNITED STATES OF AMERICA

L.G. MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' single interstate telephone call was sufficient to establish federal jurisdiction under the Travel Act, 18 U.S.C. 1952.

2. Whether police conduct in this case was so outrageous that it violated the Due Process Clause.

3. Whether any error in admitting two tape-recorded conversations against petitioner Moore was harmless beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a)[1] is reported at 716 F.2d 257. The order of the district court (Pet. App. 39a-41a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a) was entered on September 19, 1983. A petition for rehearing was denied on November 22, 1983 (Pet. App. 43a). The petitions

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[1]References are to the appendix in No. 83-1226.

for a writ of certiorari were filed on January 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted of aiding and abetting each other in using a telephone to facilitate bribery, in violation of the Travel Act, 18 U.S.C. 1952 and 18 U.S.C. 2. They were each sentenced to five years' probation and a $10,000 fine.[2] The court of appeals affirmed (Pet. App. 1a-37a).

The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 3a-9a). Briefly, it showed that in 1979 insurance broker Joseph Hauser pleaded guilty to federal charges of paying bribes and receiving kickbacks in connection with union insurance contracts. In return for a reduced sentence and financial support, Hauser agreed to cooperate with the government in investigating this type of crime. Accordingly, Hauser and two undercover FBI agents, Mike Wacks and Larry Montague, set up a fictitious insurance agency, through which they purported to represent the Prudential Insurance Company, and began negotiations with labor union leaders (*id.* at 3a-4a).[3]

In August 1979, petitioner Moore, a Texas union official, was introduced to Hauser by Harold Grubbs. Moore discussed his union connections in many states and indicated that insurance business for Texas school and hospital districts might be available. On September 10, Moore, Hauser, and Agent Wacks discussed potential commissions that Moore could make (a sum of $600,000 was mentioned), and Hauser paid Moore $2,000 up front (Pet. App. 5a).

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[2]The jury was unable to reach a verdict on another Travel Act count and one count of conspiracy.

[3]The resulting series of investigations has come to be called "Brilab."

Moore subsequently introduced Hauser to petitioner Garrett, the President of Richmond Road Engineering and a commissioner for the Port of Houston. Garrett called Jim Westmoreland, a Houston City Councilman, to ask him about obtaining the city employees' insurance contract that was going to come open for bidding. In exchange, Garrett wanted one half of the agents' commissions on the contract, which he would split with Moore (Pet. App. 6a). At a meeting two weeks later attended by Garrett, Moore, and the two agents, Garrett suggested that Westmoreland be paid $2,000 (*id.* at 7a). But later that night, Garrett told Agent Montague that Westmoreland should be paid only after the deal was signed (*id.* at 8a).

Coincidentally, the Prudential Insurance Company made a legitimate bid — unrelated to the undercover activity involving Hauser and the two agents — for the city employees' insurance contract. On December 26, the Houston City Council accepted Prudential's proposal (Pet. App. 6a-7a). At that council meeting, Westmoreland seconded the motion for adoption of the Prudential contract. The next day, Moore, in Garrett's presence, called Agent Wacks at Hauser's California office and told him that the contract was up for a vote that day. Moore also said that they needed $10,000 to pay off other councilmen. The undercover agent agreed to pay. Later that day, Moore told Agent Wacks that a $12 million contract had been awarded, of which 10% would be paid as a commission to petitioners and the agents (*id.* at 8a-9a).

On December 28, Moore again called Agent Wacks and requested $10,000 so that Garrett could pay Westmoreland. Nine days later the two agents met with petitioners and paid them $6,000 as their share of the first month's commissions. They also left $5,000 with Garrett for Westmoreland's payment. Subsequently, Moore told Agent Montague that

Garrett had given the money to Westmoreland, and Garrett then told Montague that Westmoreland wanted the additional $5,000 (Pet. App. 9a).

ARGUMENT

1. The jurisdictional predicate for petitioners' Travel Act convictions was the December 27, 1979, interstate telephone call placed at petitioner Garrett's request by petitioner Moore to Agent Wacks at the insurance company office in California. During the telephone conversation, Moore told Wacks that the vote on the insurance contract had been postponed by the city council and that $10,000 was needed to "move" a couple of the councilmen. Petitioner Garrett contends (Pet. 6-14) that this telephone call was insufficient to sustain federal jurisdiction because it did not facilitate unlawful activity and because it occurred after the completed state offense of bribery (even though the bribe money had not yet been paid).[4] In addition, both petitioners contend (Garrett Pet. 14-21; Moore Pet. 9-19) that federal jurisdiction was artificially created by the agents' use of the California office location. The court below correctly rejected these claims.

a. The Travel Act proscribes the use of interstate facilities to "facilitate" unlawful activities that are "thereafter" performed. 18 U.S.C. 1952(b)(2). Here, the telephone call from Moore to Agent Wacks unquestionably "facilitated" the bribery scheme. As the court of appeals explained (Pet. App. 16a), the "call to Wacks to obtain funds (which resulted in Wacks subsequently giving [petitioners] $10,000) actually benefited [petitioners'] plans to arrange payment for Westmoreland in accordance with their agreement to

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[4]Under Texas law, the crime of bribery was complete when petitioners agreed to pay Westmoreland for his vote. Tex. Penal Code Ann. § 36.02(a)(1) (Vernon Cum. Supp. 1984).

pay him for his vote." [5] The Travel Act does not require that the use of a facility in interstate commerce be a "substantial" or an "integral" part of the scheme; it requires only that such use contribute to the scheme in some way. See *United States* v. *Jones*, 642 F.2d 909, 913 (5th Cir. 1981); *United States* v. *LeFaivre*, 507 F.2d 1288, 1296-1297 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); *United States* v. *Miller*, 379 F.2d 483, 486 (7th Cir.), cert. denied, 389 U.S. 930 (1967). That requirement was plainly satisfied here.[6]

Nor is there any merit to the claim that Moore's call was insufficient to sustain federal jurisdiction because it occurred after the completed state offense. To be sure, the Travel Act requires that illegal acts be performed *after* the use of a facility in interstate commerce. But that is precisely what happened here: the telephone call preceded the actual payment of the bribe to Westmoreland by more than three weeks (see Pet. App. 8a-9a). The fact that the state offense

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[5]Moore's call was sufficient to invoke Travel Act jurisdiction over Garrett since Garrett directed Moore to call the agents and was present during the call.

[6]The cases upon which petitioner Garrett relies all arose under facts sharply distinguishable from those here. For example, *United States* v. *Altobella*, 442 F.2d 310 (7th Cir. 1971), involved the cashing of a single out-of-state check representing the fruits of an extortion scheme. *United States* v. *Isaacs*, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974), involved the travel in interstate banking channels of three checks used to distribute the proceeds of an illegal bribery scheme. In *United States* v. *Lightfoot*, 506 F.2d 238 (D.C. Cir. 1974), federal jurisdiction was asserted on the basis of the defendant's interstate purchase of an automobile with funds derived from prostitution. And in *United States* v. *O'Dell*, 671 F.2d 191 (6th Cir. 1982), the claimed basis for federal jurisdiction was defendants' placement of advertisements for their massage parlors in local newspapers, some copies of which were sent out of state. Here, by contrast, the telephone communication was with the out-of-state insurance agency that was the intended beneficiary of the contract that was the subject of the bribe, and the purpose of the call was to obtain the bribe money.

was technically complete when the bribe was offered is irrelevant; the actual payment of the bribe was itself illegal under Texas Law (Tex. Penal Code Ann. § 36.02(a)(1) (Vernon Cum. Supp. 1984)) and was an intrinsic part of the ongoing bribery scheme. See *Perrin* v. *United States*, 580 F.2d 730 (5th Cir. 1978), aff'd, 444 U.S. 37 (1979) (defendants had already offered to bribe the employee, an offense under state law, but used the interstate call to exploit the stolen data in order to pay the bribe); *United States* v. *Eisner*, 533 F.2d 987, 993 (6th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *LeFaivre*, 507 F.2d at 1291.[7]

b. In arguing that the agents artificially created federal jurisdiction by locating their fictitious insurance agency in California, petitioners rely entirely on *United States* v. *Archer*, 486 F.2d 670, 685-686 (2d Cir. 1973). In *Archer*, the court of appeals rejected the invocation of Travel Act jurisdiction on the basis of several interstate and foreign telephone calls. One of the calls was made by a government agent who travelled to New Jersey solely in order to make an interstate call to the defendants in New York, which the defendants then returned. *Id.* at 681. A second call was made by the defendants to Las Vegas in response to a government plant of misinformation that the agent could be reached there. *Id.* at 682. And the final call was placed by the agent to the defendants while the agent was pursuing another government investigation in Paris. *Id.* at 682-683. On rehearing in *Archer* the court explained (*id.* at 685-686

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[7]Petitioner Garrett also argues that there was no federal jurisdiction here because "[t]his was an essentially local scheme to bribe a local city councilman" (Pet. 13). But in *Perrin* v. *United States*, 444 U.S. at 50, this Court indicated that "so long as the requisite interstate nexus is present, the [Travel Act] reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement." Thus, as the court below concluded (Pet. App. 13a), "bribery of a city official * * * is clearly within the ambit of the statute."

(emphasis added)) that it had gone "no further than to hold that when the federal element in a prosecution under the Travel Act is furnished *solely* by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves."

In the instant case, federal jurisdiction was not " 'furnished *solely* by [the] undercover agents' " (Pet. App. 19a). Accordingly, the court of appeals was correct (*ibid.*) that it had no need either to "adopt or reject" the *Archer* standard. Even under the *Archer* approach, the interstate nexus here was sufficient to support federal jurisdiction.

The December 27 telephone call was not contrived by the government but made by defendants on their own initiative. Indeed, since the intent of petitioners' bribery scheme was to procure business for an out-of-state insurance agency that was providing the wherewithal for the scheme, it was natural and perhaps inevitable that interstate facilities of communication would be used. Moreover, as the court of appeals observed (Pet. App. 19a), "no evidence shows that the agents initially set up [their fictitious insurance business] in California or arranged to be there when [petitioners] needed to telephone them for additional funds solely for the purpose of contriving an interstate nexus." Rather, "[t]he agents had established a base in California because of Hauser's connections there and, subsequently, decided to branch out-of-state from California into Louisiana and Texas because their activities in California were impaired by publicity that Hauser was a government informer" (*ibid.*). Based on the preexisting out-of-state operation, as well as petitioners' knowledge of the interstate nature of the agents' insurance business, the court of appeals correctly concluded (*id.* at 20a) that the interstate nexus was not "artificially created to invoke federal jurisdiction." See *United States* v. *Bagnariol*, 665 F.2d 877, 896-899 (9th Cir. 1981). This factual determination does not warrant further review.

2. Relying on the concurring and dissenting opinions in *Hampton* v. *United States*, 425 U.S. 484 (1976), petitioners contend (Garrett Pet. 21-29; Moore Pet. 19-24) that the federal agents' activities were so "outrageous" as to violate due process. Even assuming the validity of the general legal standard petitioners assert (but see *Hampton*, 425 U.S. at 488-490 (plurality opinion)), their claim is entirely without merit on the facts of this case.

Essentially, petitioners claim that the agents' conduct was outrageous in three respects. First, petitioner Garrett asserts (Pet. 26) that the degree of government involvement in the bribery scheme was outrageous, arguing that, but for the agents' participation, petitioners would have been incapable of committing the bribery. However, the evidence showed that the government merely provided petitioners with the opportunity and facilities for committing an offense, which petitioners willingly and actively exploited for their own gain. As this Court observed in *Sorrells* v. *United States*, 287 U.S. 435, 441 (1932), "[i]t is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." The government's involvement here was certainly no greater than that sanctioned by the Court in *Hampton*, where "the drug which the Government informant allegedly supplied to petitioner both was illegal and constituted the *corpus delicti* for the sale of which the petitioner was convicted" (425 U.S. at 489), or in *United States* v. *Russell*, 411 U.S. 423, 427 (1973), where the undercover agent provided "a scarce ingredient essential for the manufacture of [the illegal drug]." [8]

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[8] Petitioner Garrett's reliance on *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978), is inapposite. There, the government informant was "completely in charge of the entire laboratory" used for the illegal operation. *Id.* at 376.

Second, petitioner Garrett argues (Pet. 28-29) that the agents' conduct was outrageous because they "allowed the city council to vote (and, indeed, sign a contract) knowing that some of the votes were the product of the efforts of the federal government and not the product of a legitimate desire to promote the welfare of the city." But even assuming that the agents' conduct in this respect was outrageous,[9] "the fact remains that '[t]he limitations of the Due Process Clause * * * come into play only when the Government activity in question violates some protected right of the *defendant*.' " *United States* v. *Payner*, 447 U.S. 727, 737 n.9 (1980) (quoting *Hampton* v. *United States*, 425 U.S. at 490 (plurality opinion)). Here, petitioner Garrett's own rights clearly were not affected by the conduct to which he objects. See *United States* v. *Jannotti*, 673 F.2d 578, 610 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982).

Finally, despite the jury's rejection of his entrapment defense, petitioner Moore asserts (Pet. 20-24) that the agents' conduct was outrageous in view of the degree of government inducement in this case, including an offer to him of $600,000. To be sure, a majority of this Court in *Hampton* indicated that a finding of no entrapment does not necessarily preclude the availability of a due process defense. But where, as here, "the extent of government inducement necessarily was considered by the factfinder in its rejection of the entrapment defense * * * a successful due

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[9]It is clear that the Prudential bid would have been accepted by the city council regardless of the Westmoreland bribe, since all but one or two of the nine councilmen voted for it (Tr. 37, 103, 199) and no other councilmen were offered bribes (Tr. 37, 206-252). In fact, the Texas Municipal League, a commission representing over 200 cities in Texas that sought to combine the bargaining power of the cities in order to obtain favorable insurance coverage, independently reviewed the insurance available and selected Prudential's plan as providing the best coverage at the lowest price (Pet. App. 7a).

process defense must be predicated on other grounds." *United States* v. *Jannotti*, 673 F.2d at 608.

Petitioners' due process claim was considered by the court of appeals and rejected on the facts of this case. See Pet. App. 35a-37a. Further review by this Court of this fact-bound issue is not warranted.

3. At trial, the government sought to introduce two taped conversations between Harold Grubbs and Joseph Hauser containing assertions that petitioner Moore would be a likely candidate to help Hauser obtain insurance business and describing Moore as someone who would "deal." Over Moore's objection that the conversations were inadmissible hearsay and that their admission would violate his right of confrontation because Grubbs was unavailable to testify, the district court allowed the evidence for the sole purpose of showing why Hauser approached Moore (Tr. 24, 67-68). While expressing doubt that the taped conversations were properly admissible for that purpose, the court of appeals concluded that any error in admitting the conversations was harmless (Pet. App. 32a). Petitioner Moore challenges this ruling (Pet. 24-29).

In particular, Moore argues that, in applying the harmless error doctrine, the court failed to consider his contention that the admission of the conversations violated not only the rule against hearsay but his constitutional right of confrontation as well. However, the court's discussion of this issue plainly reflects its awareness of Moore's claim "that his Sixth Amendment confrontation rights were violated because Grubbs was unavailable for cross-examination with respect to the allegedly hearsay statements" (Pet. App. 31a). And although the court's "doubt" about the admissibility of the evidence appears to have rested solely on the nonconstitutional basis of Fed. R. Evid. 403 (see Pet. App. 32a), there is in the opinion no suggestion that the court was applying the somewhat more relaxed standard of harmless error appropriate for nonconstitutional claims.

Indeed, the standard of harmlessness beyond a reasonable doubt was clearly satisfied in this case. The district court expressly cautioned the jury that it should not "hold against [petitioners], in any way, the fact that this other man, Mr. Grubbs, whom you will not see here, said some bad things about Mr. Moore" and that "[f]or all you know, Harold Grubbs was absolutely making up every word he said about L.G. Moore" (Tr. 24). Moreover, evidence adduced after the admission of the Grubbs-Hauser conversations, primarily in the form of tape-recorded conversations between Moore, Garrett, and the government agents, "showed that Moore readily and immediately joined the insurance scheme and was active at every stage of the events" (Pet. App. 33a). As the court of appeals concluded (*ibid.*), "[c]onsidering the entire record, * * * Grubbs' references to Moore in the tapes, which the jury was repeatedly cautioned by the district court not to credit for their truth, [did not] cause[] prejudice to any appreciable degree to Moore's entrapment defense." The court of appeals' application of the harmless error standard to this set of facts does not raise an issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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